IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.3387 OF 2007

Mohan Hotchand Khanchandani .. Petitioner

vs

Bhavika Paresh Shah & anr .. Respondents

WITH WRIT PETITION No.3392 OF 2007

Mohan Hotchand Khanchandani .. Petitioner

vs

Bhavika Paresh Shah & anr .. Respondents

Mr.Dharam Sharma i/b Dharam & Co for Petitioner
Mr.Vinod S.Pandey i.b Shri S.U.Pandey for Respondent no.1

CORAM : A.S.OKA, J

DATED : 10th September, 2007

JUDGMENT

1. By an order dated 24th August, 2007 these petitions were ordered to be heard finally.

2. Heard the submissions of the learned counsel for the parties.

3. The 1st respondent is the wife of the 2nd respondent. There is a matrimonial petition pending between the 1st and 2nd respondents in the Family Court at Bombay.

4. According to the case of the petitioner, the respondent jointly acquired a flat which is the subject matter of dispute in these two petitions and both the respondents were members of the co-operative housing society in which the flat is situated. According to the case of the petitioner,

on 13th October, 2005 the respondent no. 2 for himself and in his capacity as the alleged Constituted attorney of the respondent no.1 executed an agreement for sale in respect of the said flat in favour of the petitioner. According to the case of the petitioner, a sum of Rs.4,00,000/- was paid by him to the 2nd respondent by two cheques in the sum of Rs.2,00,000/- each and cash amount of Rs.2,00,000/- was paid by him to the 2nd respondent constituting total agreed consideration of Rs.6,00,000/-. According to the case of the petitioner, though the said agreement was not registered, along with the deed of confirmation dated 14th June, 2006 the said agreement was duly registered in the office of the Sub-Registrar of Assurances.

5. An application was made by the petitioner to the concerned co-operative housing society for admitting him as a member. However, the said request was not acceded to by the society on the ground that there was an order of temporary injunction passed by the Family Court on 27th December, 2005 restraining the 2nd respondent from transferring the said flat till further orders.

6. The petitioner applied before the Family Court for impleading himself as a party respondent to the petition filed by the 1st respondent for divorce. By an order dated 26th March, 2007 the learned Judge rejected the said application. By a separate order passed on the same day, the learned Judge of

the Family Court allowed the application filed by the 1st respondent and permitted the 1st respondent to enter the said flat on the ground that the said flat is her matrimonial home. Writ Petition No.3387 of 2007 has been filed by the petitioner for challenging order dated 26th March, 2007 passed by the Family Court by which the 1st respondent is permitted to enter the said flat. Writ Petition No.3392 of 2007 is filed by the petitioner for challenging the order by which application made by the petitioner for impleadment has been rejected. It must be stated here that on the basis of the impugned order, the 1st respondent has already entered the said flat and as of today the 1st respondent is in possession thereof.

7. The submission of the learned counsel for the petitioner is that while rejecting the application for impleadment, the Family Court has proceeded on an erroneous assumption that an agreement was entered into by the petitioneor in respect of the said flat after the order of injunction dated 27th December 2005 was passed by the Family Court. He submitted that there is evidence to show that a sum of Rs.4,00,000/- by two cheques in the sum of Rs.2,00,000/- each was paid by the petitioner to the 2nd respondent in October, 2005. He submitted that though the agreement is of October, 2005, the same was duly registered alongwith a deed of confirmation dated 14th June, 2006. He therefore, submitted that transfer of the said flat in favour of the petitioner has been completed prior to the

date on which order of injunction was passed.

8. Learned counsel appearing for the first respondent submitted that there is no power of attorney executed by the 1st respondent in favour of the 2nd respondent. He submitted that as there is no power of attorney, assuming that the agreement of sale was executed was by the 2nd respondent even prior to 27th December, 2005, the 1st respondent continues to be the owner of 1/2 share in the said flat. He submitted that on the face of it, the transaction has been made by the 2nd respondent after the order of temporary injunction was passed by the Family Court. He submitted that the Family Court was justified in passing an order permitting the 1st respondent to enter the said flat as the said flat is her matrimonial home. It must be stated here that learned counsel for the petitioner has stated that the petitioner desires to file a suit for establising his title in respect of the said flat.

9. I have perused the impugned orders. Order dated 26th March, 2007 passed by the Family Court on the application At Exhibit 11 for impleadment made by the petitioner records that the transaction is illegal in view of the Report of the police. However, no finding has been recorded as regards the execution of the alleged Power of Attorney by the 1st Respondent. There is no prima facie finding recorded by the Family Court on the aspect of the title. In so far as the order passed on

Exhibit 17 is concerned, the learned Judge has referred to the report dated 7th August, 2006 submitted by Dindoshi Nagar police station. On the basis of the said report, the learned Judge has observed that in order to take revenge, the 2nd respondent was illegally trying to sell the said flat. The learned Judge held that the said flat was a matrimonial home of the 1st respondent. Therefore, the learned Judge proceeded to allow the 1st respondent to enter possession of the said flat.

10. As stated earlier, the petitioner desires to file a suit for establishing his title. Perusal of the orders impugned in both the petitions show that there is no adjudication made as regards the alleged rights of the petitioner. The Family Corut has not decided the question as to whether the transaction was in fact made in October, 2005 as contended by the petitioner. There is no finding recorded on the Power of Attorney allegedly executed by the 1st respondent. As of today, the 1st respondent has already entered possession of the said flat. Therefore, a limited interim protection was granted by this Court in terms of prayer clause (b) in Writ Petition No.3387 of 2007. The petitioner has made a statement that he wants to file a suit on title in the appropriate court. Hence, it is not necessary to interfere with the impugned orders. However, ad interim relief granted by this Court will have to be continued for a reasonable time to enable the petitioner to

obtain suitable orders from the appropriate court in a suit on title. It will have to be clarified that by both the impugned orders, no adjudication has been made by the Family Court as regards the alleged rights of the petitioner in respect of the flat in question and the observations made by the Family Court in the impugned orders are only tentantive observations. The suit or proceedings which may be filed by the petitioner will be decided on its own merits and all contentions of both the parties including the contentions raised by the 1st respondent regarding genuineness of the transaction are expressedly kept open.

11. Hence, these petitions are disposed by passing the following order :

(a) It will be open for the petitioner to file a suit or apropriate proceeding before the appropriate forum for establishing his title/ownership in respect of the flat in dispute.

(b) The said suit or proceeding and interim application made therein shall be decided by the appropriate court without being influenced by the tentative observations made by the Family Court in the impugned orders and all contentions of the parties on merits are expressedly kept open.

(c) Ad interim relief granted by this Court on 4th July, 2007 in Writ Petition No.3387 of 2007 will continue to operate for a period of 8weeks from today to enable the petitioner to take out appropriate steps.

(d) Subject to what is stated above, the impugned orders are confirmed.

(e) There will be no order as to costs.

Parties to act on an authenticated copy of this order.

(A.S.Oka, J)